

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 81

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The People of the State of New York :

- against - : Decision and Order

Harvey Weinstein, :  
Ind. No. 2335/18

Defendant. :

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James M. Burke, J.:

The defendant is charged by indictment with five felony sex offenses, specifically, Counts One and Three charge Predatory Sexual Assault, Penal Law §130.95(2), Count Two charges Criminal Sexual Act in the First Degree, PL §130.50(1), Count Four charges Rape in the First Degree, PL §130.35(1), and Count Five charges Rape in the Third Degree PL §130.25(3). The defendant moves to dismiss the indictment and for other relief. Count Six, which charged the defendant with Criminal Sexual Act in the First Degree, in violation of PL § 130.50(1) was dismissed on October 11, 2018. The defendant's motion is decided as follows:

1. The defendant moves to dismiss the indictment claiming defects and deficiencies in the indictment and in the Grand Jury proceedings. CPL §210.20(1)(a) and (c), CPL §210.23(3) and CPL §210.35(5).

The defendant contends that the Grand Jury proceeding was defective as to Counts Three, Four and Five, which relate to the same complainant, because the People failed to provide exculpatory evidence to the Grand Jury of a "long term consensual relationship" between the complainant and the defendant. The defendant also moves to dismiss the other counts of the indictment claiming there exists "additional" exculpatory evidence pertaining to another complainant that the People did not present to the Grand Jury.

The People generally enjoy wide discretion in presenting their case and are not required to present exculpatory or mitigating evidence in the Grand Jury. They are not obligated to search for evidence favorable to the defense or to present all evidence in their possession favorable to the accused. The Grand Jury is not an

adversarial proceeding and the People do not have the same obligation of disclosure at the Grand Jury stage as they have at the trial stage. See People v Mitchell, 82 NY2d 509 (1993); People v Lancaster, 69 NY2d 20 (1986). The Court's review of the Grand Jury minutes shows that the presentation was legally and procedurally proper, and that the People presented evidence in a fair manner. Nor did the People provide a misleading account of the relationship between the defendant and the complainants. The motion to dismiss on these grounds is denied.

The defendant further moves to dismiss the indictment contending that it was tainted by police and prosecutorial misconduct. The defendant claims that there was "pervasive falsity and professional misconduct in and around the grand jury, attributable to the police, the District Attorney and the complainants." The defendant further contends that the the misconduct of law enforcement must be imputed to the prosecutor. The defendant requests evidentiary hearings regarding Detective DiGuadio, Assistant District Attorney Iluzzi-Orbon, Sgt. Keri Thompson, former Chief Michael Osgood and Lucia Evans, regarding purported misconduct by these persons. The defendant also requests a hearing regarding a friend of one of the complainants whom the defendant claims can provide corroborating evidence that the defendant and this complainant were engaged in a consensual sexual relationship.

The exceptional remedy of dismissal of an indictment under CPL §210.35(5) requires that the integrity of the proceeding was impaired and that the defendant may have been prejudiced by such defect. To prevail on this motion, a defendant must show that, in the absence of the complained-of misconduct, a grand jury might have decided not to indict a defendant. In general, this demanding test is met only where the prosecutor engaged in an overall pattern of bias and misconduct that is pervasive and typically willful. People v Thompson, 22 NY3d 687 (2014); People v Kaba, 177 AD2d 506 (2d Dept 1991).

The Court finds that there is no basis for the defendant's claim of prosecutorial or law enforcement misconduct in the proceedings, or pervasive falsity in and around the Grand Jury presentation. Moreover, there is no basis in law that the conduct of law enforcement must be imputed to the prosecutor. People v Johnson, 216 AD2d 185 (1st Dept 1995); People v Figueroa, 167 AD2d 101 (1<sup>st</sup> Dept 1990). The Court finds that the charges presented in the Grand Jury were supported by competent evidence and the proceedings were properly conducted. The motion to dismiss on these grounds is denied.

The request for hearings regarding certain witnesses is denied. The defendant does not provide a legal or factual basis to request such hearings. The defendant may explore any issues of witness credibility at a trial should such witnesses testify. See

People v Perry, 187 AD2d 678 (2d Dept 1992); People v Sepulveda, 122 AD2d 175 (2d Dept 1986).

The defendant contends that the information that led to the dismissal of Count Six impaired the integrity of the entire grand jury process, requiring dismissal of every count. As previously stated, to prevail on a motion to dismiss an indictment based on a defective proceeding, a defendant must show an impairment to the integrity of the proceedings and that the defendant may have been prejudiced.

A review of the evidence and instructions shows that the Grand Jury was instructed to treat this count as a separate charge, and contrary to the defendant's arguments, such presentation did not infect the integrity of the other charges. Additionally, Count Six does not serve as a basis for either of the Predatory Sexual Assault charges.

Furthermore, the dismissal of Count Six was based on the People's position that they may not have been able to prove the defendant's guilt beyond a reasonable doubt after cross-examination of that complainant at trial, not that the testimony of the complainant in the Grand Jury was false.

The defendant also moves to dismiss the indictment claiming a "lack of evidence" to charge the defendant with any crimes, and that District Attorney Cyrus Vance was under "political pressure" to prosecute the defendant. The Court has found the Grand Jury presentation to be legally sufficient to support the charges and that the proceedings were properly conducted. As stated above, dismissal is an exceptional remedy and only available in rare cases. The claim of "political pressure" is speculative and not grounds for dismissal. The motion to dismiss on these grounds is denied.

The defendant moves to dismiss Counts One, Two, Three and Four, all of which contain the element of forcible compulsion, on the basis that there was insufficient evidence before the Grand Jury to support this element. The Court has examined the Grand Jury minutes and finds that there was sufficient evidence to support these charges and therefore the motion to dismiss on these grounds is denied.

The defendant moves to dismiss Count One, charging Predatory Sexual Assault, claiming that the aggravating factor required under the statute did not occur until nearly seven years after the underlying crime had allegedly been committed.

A person commits Predatory Sexual Assault pursuant to Penal Law §130.95

(2) when that person commits one of the enumerated offenses against one person and has engaged in conduct constituting an enumerated offense against one or more additional persons. There is nothing in the plain language of the statute imposing any time limitation between the crimes. The statute speaks only to the number of victims. The motion to dismiss on these grounds is denied.

The defendant moves to dismiss Counts One and Three, both charging Predatory Sexual Assault, claiming the statute is “unconstitutionally vague.”

The Court finds that the statute is “sufficiently clear to apprise a person of ordinary intelligence that the sort of conduct in which the defendant engaged comes within the statute’s prohibition” and is not “unconstitutionally vague.” See People v Garcia, 29 AD3d 255 (1<sup>st</sup> Dept 2006). The motion to dismiss is therefore denied.

The defendant also moves to dismiss the indictment because People failed to give him adequate notice that they were presenting more serious charges to the Grand Jury than those in the felony complaint. The People are not required to give notice with respect to separate or additional charges which are not included in a felony complaint. People v Brown, 290 AD2d 226 (1<sup>st</sup> Dept 2002); People v Clarke, 240 AD2d 325 (1997); People v Hernandez, 223 AD2d 351 (1<sup>st</sup> Dept 1996). The motion to dismiss the indictment on these grounds is denied.

2. The defendant moves to dismiss the indictment contending that he was not afforded his right to testify before the Grand Jury. CPL §190.50.

On May 16, 2018, prior to the vote by the Grand Jury on the first indictment, the defendant served notice of his intention to testify before the Grand Jury. The People informed the defendant that on May 21, 2018, the defendant would have an opportunity to testify before a Grand Jury considering sexual assault crimes.

On May 25, 2018, the defendant was arrested and arraigned in Criminal Court on a felony complaint charging him with the crimes of Criminal Sexual Act in the First Degree, Rape in the First Degree, and Rape in the Third Degree.

On May 29, 2018, the defendant requested an adjournment from this Court for him to obtain “exculpatory email evidence” that he would “provide to the District Attorney’s Office, which office would then be obligated by law to ask the Grand Jury if it wanted to hear that evidence.” The Court denied the defendant’s request for an adjournment.

The defendant withdrew notice to testify and the Grand Jury returned a three-count indictment with the identical charges in the felony complaint.

On June 18, 2018, the People, having presented further evidence before the Grand Jury, but prior to taking a vote, asked defense counsel whether the defendant was withdrawing his cross notice as to all sexual assault counts, to which counsel responded in an email on that same date, "Yes, Confirmed." The Grand Jury voted to indict the defendant with additional crimes in superseding Indictment No. 2335/18.

The email communication sent by the defendant to the People, attached to the People's response, indicated clearly and unambiguously that he withdrew notice of his intent to testify before the Grand Jury regarding any sexual assault charges being considered by the Grand Jury. Therefore, this Court finds that there was no violation of the defendant's right to testify before the Grand Jury pursuant to CPL § 190.50, and the motion to dismiss on these grounds is denied.

3. The defendant moves to dismiss Count Five, which charges of Rape in the Third Degree, contending that the period between the alleged occurrence and the commencement of the action (here the defendant's arrest on the felony complaint), exceeded the five-year statute of limitations. CPL §30.10(2)(b).

While the statute of limitations for bringing the charge of Rape in the Third Degree is five years, CPL §30.10 (4)(a)(i) excludes any period following the commission of the offense during which the defendant was continuously outside the state. The People have provided sufficient documentation, and the defendant has not provided facts to contradict the People's position, showing that the defendant was outside the jurisdiction for a sufficient number of days during this period. Accordingly, the statute of limitations has not been violated. The motion to dismiss Count Five on these grounds is denied.

4. The defendant moves to dismiss the indictment on other grounds constituting a defective grand jury presentation, including that the grand jury was not properly instructed on the publicity involved in this case, that there lacked twelve grand jurors who heard all the critical and essential testimony, and that the People failed to instruct the grand jury that they were to consider each crime separately. The Court has reviewed the Grand Jury minutes and finds that they are legally sufficient to support the charges and that the proceedings were properly conducted.

5. The People's request to amend Count Five to read "130.25(3)" instead of "130.25(1)" is granted.

6. The defendant's motion for discovery and a bill of particulars is granted to the

extent provided by the People. The defendant's request for a complainant's "prompt outcry" is not discoverable at this time.

7. The People's request for reciprocal discovery is granted to the extent that the defense is directed to comply with the provisions of CPL §§240.30 and 250.20.

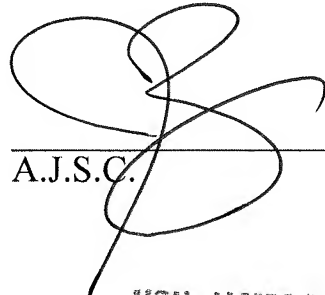
8. The People are reminded of their continuing duty to provide all Brady material.

This shall constitute the decision and order of the Court.

Dated: New York, New York

December 20, 2018

Part 81 DEC 20 2018

  
A.J.S.C.  
HON. JAMES M. BURKE